90-1528

FILED
JUL 1 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD L. DUGGER,

Petitioner,

vs.

MOTION TO PROCEED *IN FORMA PAUPERIS*

JOHN T. TUKES,

Respondent.

_____/

The Respondent, JOHN T. TUKES, by and through his undersigned attorney, pursuant to Rule 39 of this Court, moves to proceed *in forma pauperis*, and in support thereof states that the undersigned counsel was appointed by the Eleventh Circuit Court of Appeal under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6) and had sought and did received in the lower court permission to proceed *in forma pauperis*.

Respectfully submitted by

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of June, 1991, a true copy of the foregoing Motion to Proceed *in forma pauperis* was mailed to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050.

MICHAEL DODDO, ESQUIRE

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RICHARD L. DUGGER, Secretary
Florida Department of Corrections,

Petitioner,

vs.

JOHN T. TUKES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

MICHAEL DODDO, ESQUIRE
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Counsel for Respondent

QUESTIONS PRESENTED

WHETHER *STONE V. POWELL*, WHICH PRECLUDES CONSIDERATION OF FOURTH AMENDMENT CLAIMS IN HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C. 2254, REQUIRES AS A PREREQUISITE TO THE BAR AGAINST CONSIDERING FOURTH AMENDMENT CLAIMS, THAT STATE TRIAL COURTS MAKE EXPLICIT FACTUAL FINDINGS, IN ADDITION TO THE PRONOUNCED FINDING REGARDING THE VALIDITY OF THE SEARCH?

WHETHER *STONE V. POWELL* REQUIRES, AS A PREREQUISITE TO THE BAR AGAINST CONSIDERING FOURTH AMENDMENT CLAIMS, THAT STATE APPELLATE COURTS NOT SUMMARILY AFFIRM STATE TRIAL COURT RULINGS ON FOURTH AMENDMENT CLAIMS?

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ARGUMENT

Respondent disagrees with Petitioner's assertion that the decision of the Eleventh Circuit imposes new standards in determining whether a Fourth Amendment claim was fully litigated in the state courts for purposes of *Stone v. Powell*.

Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), held:

> "that where the State has provided as opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial."

Stone v. Powell did not address nor describe what was meant by the concept of "full and fair litigation" apparently since that had been done thirteen years earlier in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Although *Townsend* deals what considerations should properly "govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings", id. at 310, the resolution of that question depends on whether the habeas applicant received a

> "full and fair evidentiary hearing in the state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

Id. at 312-313. *Townsend* fully discussed what criteria is to be used in determining whether the state afforded a petitioner a full and fair hearing on the issues presented.

Petitioner's contention for obtaining the Writ of Certiorari is based on the premise that "*Townsend* clearly dispels the notion set forth by the Eleventh Circuit below, that any explicit or express findings from the state trial court

are required in order to satisfy the requisite 'opportunity for full and fair litigation'". (Pet. Br. p. 20) This premise fails for several reasons.

CLEAR FINDINGS NECESSARY

The Eleventh Circuit did not decree that a pre-requisite for full and fair litigation requires specific findings by the state courts. On the contrary, the Eleventh Circuit emphasized

> "that state courts are not required to issue lengthy opinions discoursing on the application of federal constitutional law, nor are they required to pen full opinions in place of summary dispositions. Further, we presume that the issues raised by Tukes in fact were given the careful, judicious, and studied attention of the Florida State Court of Appeal. Nevertheless, for purposes of the *Stone v. Powell* bar, where the trial court failed to make ***clear findings on essential issues***, such a summary affirmance is insufficient to deny the petitioner consideration on federal habeas corpus review." (Emphasis supplied)

Tukes v. Dugger, 911 F.2d 508, 514 (11th Cir. 1990) (Pet. Ap. 37-38) By requiring the state court to make clear its findings on the relevant issues in question, the Eleventh Circuit was following the reasoning set forth in *Stone v. Powell* and *Townsend v. Sain* and is consistent with their holdings.

TOWNSEND CRITERIA

Townsend was convicted of murder and sentenced to death. Prior to and during his trial, he challenged the admission of his confession on the ground

that it was obtained while under the influence of drugs. After a hearing on his motion,

> "[t]he trial judge summarily denied the motion to suppress and later admitted the court reporter's transcription of the confession into evidence. He made no findings of fact and wrote no opinion stating the grounds of his decision. n1"[1]

Townsend v. Sain, Id. at 302. *Townsend* held that:

> "a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

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[1]The footnote to the *Townsend* trial transcript reads:

"The final defense witness who testified at the motion to suppress was excused. The following then transpired:

"MR. BRANION [a defense attorney]: That's all we have, if the Court please.

"The COURT: The defense rests on this hearing?

"MR. BRANION: Defense rests.

"The COURT: Anything further from the State?

"MR. MCGOVERN: The State rests for the purpose of this hearing, Judge.

"The COURT: Gentlemen, the Court will deny the motion to suppress and admit the statement into evidence and we will proceed with the presentation of the evidence [to the jury]." Id. at 303.

Id. at 312-313.[2]

While discussing the reasoning for the first criteria, *Townsend* emphasized that

> "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits. If relief has been denied in prior state collateral proceedings after a hearing but without opinion, it is often likely that the decision is based upon a procedural issue -- that the claim is not collaterally cognizable -- and not on the merits. On the other hand, if the prior state hearing occurred in the course of the original trial -- for example, on a motion to suppress allegedly unlawful evidence, as in the instant case -- it will usually be proper to assume that the claim was rejected on the merits."

Id. at 313-314

Townsend, while explaining the application of the first criteria, wrote:

> "If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because

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[2]Since *Townsend* raised a Fifth Amendment issue rather than the Fourth Amendment issue which *Stone v. Powell* has limited its scope, Respondent is not suggesting that the 2nd and 4th criteria set forth in *Townsend* would be applicable to a Fourth Amendment habeas review.

of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found t he law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence, such as was present in *Rogers v. Richmond*, that there is reason to suspect that an incorrect standard was in fact applied. n10 Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.

In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the "so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration." *Rogers v. Richmond*, supra,

> at 546. See *Frank v. Mangum*, supra, at 347 (Holmes, J., dissenting). Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

Id at 313-316. Respondent has provided a complete quote of *Townsend's* explanation and application of the first criteria to compare with the Eleventh Circuit analysis and application of *Stone v. Powell* to Tukes' issues.

In order to apply *Stone v. Powell*, the Eleventh Circuit wrote,

> "Although the *Stone v. Powell* bar applies to these claims because of their relation to the fourth amendment (as discussed above), the bar is not honored in federal court unless the state courts considered the claims fully and fairly. *Stone v. Powell*, 428 U.S. at 489, 96 S.Ct. at 3050; *Agee v. White*, 809 F.2d at 1490; *Morgan v. Estelle*, 577 F.2d at 940-43; *Caver v. Alabama*, 577 F.2d 1188, 1191-93 (5th Cir. 1978); *Hedden v. Wainwright*, 558 F.2d at 786; *cf. O'Berry v. Wainwright*, 546 F.2d 1204, 1209-14 (5th Cir.), *cert denied*, 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977)."

Tukes v. Dugger, supra. at 513, (Pet. App. 34) In determining whether the claim was "fully and fairly considered by the state courts', the Eleventh Circuit citing *Morgan v. Estelle*, 588 F.2d 934, 941 (5th Cir. 1979) which quoted *O'Berry*, 546 F.2d 1204, 1213 (5th Cir. 1977) as precedent for determining this point, wrote:

> "where there are facts in dispute, full and fair consideration requires consideration by the fact-finding court, and at least the availability of meaningful appellate review by a higher state court. Where, however, the facts are undisputed, and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate curt, presented with an undisputed factual record, gives full consideration to defendant's Fourth Amendment claims."

After careful review of the record and following a similar analysis suggested in *Townsend*, the Eleventh Circuit concluded that there was no meaningful hearing in the State courts because the trial court and the appellate court never made a "clear finding on the issues of whether Tukes' consent for the search was freely and voluntarily given, whether Tukes was in custody when he made a request for an attorney, or whether the interrogating police officer's testimony could be believed. Finding the record void of such findings, but adequate and undisputed factually to make a determination on those issues, the Eleventh Circuit addressed these issues and resolved them in

favor of the State. Such actions were consistent with the holdings and principles of *Stone v. Powell* and *Townsend v. Sine.*

CONCLUSION

Based upon the authorities and argument set forth above, Respondent maintains that Petition should not be granted.

Respectfully submitted

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